



COUR EUROPÉENNE DES DROITS DE L'HOMME
EUROPEAN COURT OF HUMAN RIGHTS

SECOND SECTION

CASE OF LEŞKER ACAR v. TURKEY

(Application no. 39678/98)

JUDGMENT

STRASBOURG

22 June 2004

FINAL

22/09/2004

This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.

In the case of Leşker Acar v. Turkey,

The European Court of Human Rights (Second Section), sitting as a Chamber composed of:

Mr J.-P. COSTA, *President*,

Mr A.B. BAKA,

Mr L. LOUCAIDES,

Mr R. TÜRMEŒ,

Mr C. BİRSAN,

Mr K. JUNGWIERT,

Mr M. UGREKHELIDZE, *judges*,

and Mr T.L. EARLY, *Deputy Section Registrar*,

Having deliberated in private on 2 December 2003 and on 1 June 2004,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 39678/98) against the Republic of Turkey lodged with the European Commission of Human Rights (“the Commission”) under former Article 25 of the Convention for the Protection of Human Rights and Fundamental Freedoms (“the Convention”) by a Turkish national, Mr Leşker Acar (“the applicant”), on 9 January 1998.

2. The applicant was represented by Mr M. Özer, a lawyer practising in Diyarbakır. The Turkish Government (“the Government”) did not designate an Agent for the purposes of the proceedings before the Court.

3. The applicant alleged that he had been denied a fair hearing within a reasonable time by an independent and impartial tribunal.

4. The application was transmitted to the Court on 1 November 1998, when Protocol No. 11 to the Convention came into force (Article 5 § 2 of Protocol No. 11).

5. The application was allocated to the Second Section of the Court (Rule 52 § 1 of the Rules of Court). Within that Section, the Chamber that would consider the case (Article 27 § 1 of the Convention) was constituted as provided in Rule 26 § 1.

6. On 1 November 2001 the Court changed the composition of its Sections (Rule 25 § 1). This case was assigned to the newly composed Second Section (Rule 52 § 1).

7. By a decision of 2 December 2003, the Court declared the application partly admissible. In particular, it retained the applicant's complaint concerning the alleged lack of independence and impartiality of the

Diyarbakır State Security Court which tried and convicted him and declared inadmissible the remainder of his complaints.

8. The applicant and the Government each filed observations on the merits (Rule 59 § 1).

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant was born in 1966 and lives in Silopi.

10. On 28 April 1992 the applicant was taken into police custody on suspicion of having been involved in the terrorist activities of the PKK (*Workers' Party of Kurdistan*), proscribed as a terrorist organisation under Turkish law.

11. On 25 May 1992 the applicant was brought before the Diyarbakır Public Prosecutor. He denied the allegations against him. On the same day, a judge at the Şırnak Magistrates' Court (*sulh ceza mahkemesi*) ordered the applicant's detention on remand.

12. On 1 September 1992 the public prosecutor filed an indictment charging the applicant with treason under Article 125 of the Criminal Code.

13. On 12 October 1994 the public prosecutor filed a new indictment, charging the applicant under the same provision of the Criminal Code with involvement in other terrorist activities.

14. On 28 May 1995, upon the request of the public prosecutor, the applicant's case was joined to another case which was being considered in a different chamber of the Diyarbakır State Security Court.

15. On 3 July 1998 the Diyarbakır State Security Court convicted the applicant under Article 125 of the Criminal Code of treason and sentenced him to life imprisonment.

16. The applicant's sentence was automatically referred to the Court of Cassation for appeal. The applicant's request for a hearing on his appeal was granted. On 27 October 1999 the Court of Cassation upheld the judgment of the Diyarbakır State Security Court.

II. RELEVANT DOMESTIC LAW AND PRACTICE

17. The Court refers to the overview of the domestic law derived from previous submissions in other cases, in particular *Özel v. Turkey* (no. 42739/98, §§ 20-21, 7 November 2002) and *Gençel v. Turkey* (no. 53431/99, §§ 11-12, 23 October 2003).

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

18. The applicant complained that he had been denied a fair hearing by an independent and impartial tribunal on account of the presence of the military judge on the bench of the Diyarbakır State Security Court which tried and convicted him. He invoked Article 6 § 1 of the Convention which, in so far as relevant, reads as follows:

“In the determination of ... any criminal charge against him, everyone is entitled to a fair ... hearing ... by an independent and impartial tribunal established by law.”

19. The Government replied that the rules then in force governing the appointment of military judges to the State Security Courts and the guarantees which they enjoyed in the performance of their judicial functions on the bench were such as to ensure that these courts fully complied with the requirements of independence and impartiality within the meaning of Article 6 § 1.

20. The Court notes that it has examined similar grievances in the past and has found a violation of Article 6 § 1 (see, among many other authorities, *Özel*, cited above, §§ 33-34, and *Özdemir v. Turkey*, no. 59659/00, §§ 35-36, 6 February 2003). It sees no reason to reach a different conclusion in the instant case. It is reasonable that the applicant who was prosecuted in a State Security Court for having been involved in an illegal organisation should have been apprehensive about being tried by a bench which included a regular army officer and member of the Military Legal Service. On that account, he could legitimately fear that the Istanbul State Security Court might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case. In other words, the applicant's fears as to the State Security Court's lack of independence and impartiality can be regarded as objectively justified (see *Incal v. Turkey*, judgment of 9 June 1998, *Reports of Judgments and Decisions* 1998-IV, p. 1573, § 72 *in fine*).

21. Accordingly, the Court concludes that there has been a violation of Article 6 § 1.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

22. Article 41 of the Convention provides:

“If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party.”

A. Damage

23. The applicant, without giving any particulars, claimed compensation for pecuniary and non-pecuniary damage.

24. The Government contended that there was no causal link between the facts complained of and the damage alleged and that no award should therefore be made.

25. As to the question of pecuniary damage, the Court considers in the first place that it cannot speculate as to what the outcome of the proceedings before the State Security Court might have been had the violation of the Convention not occurred (see *Findlay v. the United Kingdom*, judgment of 25 February 1997, *Reports* 1997-I, § 85). Moreover, the applicant's claim has not been substantiated by any evidence whatsoever. It therefore makes no award under this head.

26. With regard to non-pecuniary damage, the Court considers that the finding of a violation constitutes in itself sufficient compensation for any non-pecuniary damage suffered by the applicant (see *Çiraklar v. Turkey*, judgment of 28 October 1998, *Reports* 1998-VII, § 49).

27. Where the Court finds that an applicant has been convicted by a tribunal which is not independent and impartial within the meaning of Article 6 § 1, it considers that, in principle, the most appropriate form of relief would be to ensure that the applicant is granted in due course a retrial by an independent and impartial tribunal (see *Gençel*, cited above, § 27).

B. Costs and expenses

28. The applicant claimed a total amount of 1,750,200,000 Turkish liras (TRL) for fees and costs (approximately 985 euros (EUR)).

29. The Government contested the applicant's claim. They submitted that the claim had not been duly documented.

30. The Court will make an award in respect of costs and expenses in so far as these were actually and necessarily incurred and were reasonable as to quantum (see, *Sawicka v. Poland*, no. 37645/97, § 54, 1 October 2002). It notes that the fees and the expenses claimed by the applicant's representative do not in the circumstances appear unreasonable. It therefore awards the amount claimed in full.

C. Default interest

31. The Court considers it appropriate that the default interest should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

FOR THESE REASONS, THE COURT UNANIMOUSLY

1. *Holds* that there has been a violation of Article 6 § 1 of the Convention;
2. *Holds* that the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage alleged;
3. *Holds*
 - (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final according to Article 44 § 2 of the Convention, EUR 985 (nine hundred and eighty-five euros) in respect of costs and expenses, to be converted into the national currency of the respondent State at the rate applicable at the date of settlement, plus any tax that may be chargeable;
 - (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;
4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 22 June 2004, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

T.L. EARLY
Deputy Registrar

J.-P. COSTA
President